

Operational independence. Section 272(b)(1) requires affiliates to “operate independently” of a BOC. The Commission’s *Non-Accounting Safeguards Order* ruled that this provision imposes independent substantive requirements that, among other things, preclude a BOC and its Section 272 affiliate from “performing operating, installation, and maintenance functions” for each other’s facilities. *Non-Accounting Safeguards Order* ¶ 158. That order went on to observe that

allowing the same personnel to perform the operating, installation, and maintenance services associated with a BOC’s network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the opportunity for such substantial integration of operating functions as to preclude independent operation, in violation of section 272(b)(1). Regardless of whether the BOC or the section 272 affiliate were to provide such services, we agree with AT&T that allowing the same individuals to perform such core functions on the facilities of both entities would create substantial opportunities for improper cost allocation, in terms of both the personnel time spent in performing such functions and the equipment utilized. . . . Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services *would inevitably afford the affiliate access to the BOC’s facilities that is superior to that granted to the affiliate’s competitors.*

Id. ¶ 163 (emphasis added).

Despite these unequivocal findings, Condition VII provides (¶ 27(b)) that “Any SBC/Ameritech incumbent LEC may provide operations, installation, and maintenance (‘OI&M’) services to any separate Advanced Services affiliate pursuant to a tariff or approved interconnection agreement.” As the above-quoted provisions of the *Non-Accounting Safeguards Order* make clear, however, these safeguards are insufficient to prevent an affiliate from gaining superior access to the BOC’s facilities. And any interconnection agreement negotiated between an affiliate and its sister company could not possibly be regarded as the product of arm’s length negotiation, and would likely include “poison pills” intended to make it unacceptable to competitors. Also, an affiliate would be insensitive to the price it paid a BOC for OI&M,

whether that rate were contained in a tariff or an interconnection agreement.⁸⁶ Such arrangements would constitute left-pocket to right-pocket transactions for Applicants, and would present a classic opportunity for a price squeeze.⁸⁷

In addition, Condition VII limits (¶ 27(b)) the disclosure obligations that would otherwise apply to Applicants under Section 272 by providing that “public disclosure of the governing interconnection agreement (including the prices, discounts, terms and conditions associated with that agreement) shall satisfy the disclosure requirements as applied to the separate Advanced Services affiliate for products and services provided pursuant to this agreement.” This provision is far less demanding than Section 272, which requires that each *transaction* between a BOC and its affiliate be disclosed, not merely the agreement pursuant to which a transaction occurs.⁸⁸ The Condition’s attempt to curtail the Section 272 safeguards in this fashion is wholly unreasonable – all the more so in light of the *Non-Accounting Safeguards Order*’s ruling that OI&M presents “inevitabl[e]” opportunities for abuse.

Joint marketing. Condition VII would authorize (¶ 27(b)) Applicants’ advanced services affiliates to jointly market their services with a SBC/Ameritech local company, and is inadequate in numerous respects. First, the Condition permits an affiliate to “complet[e] orders for . . . local

⁸⁶ For the above reasons, the provisions of Condition VII that call for Applicants to negotiate an interconnection agreement with their advanced services affiliates (¶ 29(a)) provide no meaningful protection for nascent advanced services competition.

⁸⁷ In its recent *SBC Data Affiliate ex parte*, SBC contends that although the Commission’s interpretation of Section 272 prohibits the sharing of OI&M, “no similar language is found in 251(h).” *Id.* at 2. This argument proves far too much, of course, as Section 251(h) does not specifically prohibit *any* sharing of resources, but rather offers a broad and flexible standard intended to promote the goals of Sections 251 and 252.

⁸⁸ Memorandum Op. and Order, *Application of BellSouth Corp. et al. for Provisions of in-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599, ¶¶ 332-37 (1999).

services” as well as advanced services, but does not require the affiliate to use the same interfaces and OSS to provision Applicants’ local exchange services (or local services provided via resale or network elements) that are available to competitive LECs. Condition VII would therefore permit Applicants simply to move their local provisioning operations into their affiliate, and then argue that they had no obligation to make available to competitors the interfaces the affiliate used for pre-ordering and ordering local services.

Second, if the Proposed Conditions were approved, Applicants could attempt to evade their equal access and nondiscrimination obligations by shifting their local service provisioning to an “advanced services affiliate,” and then contending that this affiliate is not subject to Section 251(g).⁸⁹ While AT&T believes that a BOC affiliate offering local exchange service within the BOC’s own territory plainly cannot escape the equal access and nondiscrimination restrictions Congress enacted in order to curb BOC market power, some BOCs have suggested in the past that Section 251(g) is not applicable to their affiliates’ operations.

Third, Condition VII also would authorize (¶ 27(a)) customer care “after the sale” as permissible “joint marketing.” No reasonable construction of the term “marketing” includes post-sale activities. Dictionary definitions of “marketing” limit the term to “activity involved in the moving of goods from the producer to the consumer,” and do not refer to activities that occur

⁸⁹ Applicants may not advert to Section 272(g) as a source of authority for their affiliates to escape the requirements of Section 251(g). While the Commission has ruled that BOCs may use an inbound telemarketing script that recommends their Section 272 affiliates’ interLATA services, such marketing can occur only *after* a BOC obtains Section 271 relief, at which time its local market is presumptively irreversibly open to competition. Section 272(g) is merely a narrow exception to the broad nondiscrimination and equal access obligations Section 251(g) imposes.

after goods reach a purchaser's hands.⁹⁰ There is, moreover, no readily apparent limit to the scope of "customer care" that occurs "after the sale," and that phrasing invites abuses by arguably encompassing such post-sale contacts as service calls and other activities that cannot reasonably be deemed an element of "marketing" (and which are certainly not encompassed by Section 272(g)).

Finally, Condition VII would permit (§ 27(d)) an advanced services affiliate to use SBC's or Ameritech's "name, trademarks, or service marks on an exclusive basis." The Commission has never ruled that a Section 272 affiliate may share a BOC's marks in this fashion. If such marks may be used at all, Section 272(c) would require that competing providers be permitted to utilize those marks on the same terms that they are provided to the Section 272 affiliate. At minimum, an affiliate should impute the value of licensing marks in calculating its costs, as otherwise regulated services could be forced to subsidize advanced services offerings. As the staff economists of the Federal Trade Commission ("FTC") stated in their comments on the *Section 706 NPRM*, if an advanced services affiliate were permitted to use a BOC's name or logo, the BOC will have an incentive to overinvest in building its reputation, "resulting in harmful effects in both the regulated and unregulated markets," because by doing so it "enhance[s] the reputation of both it and its affiliates."⁹¹

⁹⁰ Webster's New World Dictionary (1984).

⁹¹ Comments of Staff of Bureau of Economics of Federal Trade Commission, CC Docket No. 98-147, at 4 (FCC Sept. 25, 1998). The FTC economists note further that such overinvestment in reputation amounts to improper cross subsidization, and "may be done in ways that are difficult for regulators to detect and prevent." *Id.*

Nondiscrimination. Various provisions of Condition VII also fall short of the nondiscrimination requirements of Sections 272(c) and 272(e). First, Condition VII (§ 27(c)) provides that the

overall functionality of any Advanced Services provided by the incumbent LEC in a state as of the Merger Closing Date may be provided to the separate Advanced Services affiliate on an exclusive basis within the state until 6 months after the affiliate has obtained all necessary approvals and authorizations to provide such services within the state.

As an initial matter, this provision is so vague that it can easily be abused. What constitutes the “overall functionality of any Advanced Services”? It is readily foreseeable that Applicants will argue (after their merger closes) that this subparagraph grants their affiliates exclusive access to all advanced services *equipment* during a six month period, including equipment that must be unbundled or used to provide a resold service pursuant to Section 251.

In all events, no reasonable interpretation of “exclusive” access to “overall functionality” can be squared with the requirements of the Act. Applicants will continue to have resale and unbundling obligations pursuant to Section 251(c), obligations that Section 10 makes clear the Commission may not waive or modify. Moreover, it would be utterly irrational to grant Applicants’ affiliates an “exclusive” right to any part of their network or the functionality thereof as a “condition” for approval of the Applicants’ merger, when SBC and Ameritech today must permit competitive LECs access to those same network elements on terms prescribed by the Act.

The combination of a right to “exclusive access” to “overall functionality” and Condition VII’s provision (§ 28) permitting Applicants to transfer equipment to their affiliates could, moreover, make it impossible for competitive LECs to provide advanced services to customers served from some of Applicants’ end offices. In the event Applicants were allowed to transfer

DSLAMs – the equipment that allows voice and data streams to travel over the same loop and that are necessary for DSL service – to their affiliate in an end office in which no collocation space were available, then competitors would have no means to offer advanced services, because Condition VII does not permit competitive LECs to obtain equipped loops from Applicants' advanced services affiliate. This failing means that competitors would similarly be excluded in cases in which Applicants' advanced services affiliates were utilizing remote terminals.

Condition VII also would permit (§ 28) Applicants to transfer certain equipment to their affiliates “on an exclusive basis” for a period running from July 1, 1999 until six months after the Commission issues a final order in its *UNE Remand Proceeding*.⁹² This provision runs directly counter to the broad nondiscrimination requirement of Section 272(c)(1), which the *Non-Accounting Safeguards Order* held “extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate.” *Id.* § 218. Indeed, that order did not attempt to exhaustively define the scope of Section 272(c)(1) for fear that it would “unnecessarily limit the scope of this section’s otherwise unqualified nondiscrimination requirement.” *Id.* § 216. By permitting Applicants to transfer a wide range of equipment to their affiliates on an exclusive basis, the Commission would both eviscerate Section 272(c) and open the door for wide-scale subsidization of the affiliate’s operations by encouraging Applicants to buy as much equipment as possible during the “grace period” so that they can transfer it to their affiliate’s operations. Moreover, Condition VII would virtually guarantee improper subsidization of the affiliate by allowing Applicants, not the market, to set the value of transferred facilities.

⁹² Second Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, 1999 WL 221834 (1999) (“*UNE Remand Proceeding*”).

In addition to allowing exclusive transfers of “Advanced Services Equipment,” Condition VII appears to contemplate that such transfers would carry with them the right to use the collocation space in which such equipment is located, even in cases in which collocation space in a particular Applicants’ office is exhausted.⁹³ The *Non-Accounting Safeguards Order* expressly cited collocation space as subject to the nondiscrimination requirements of Section 272(c). *Id.* ¶ 221. In addition, that Order held that that a BOC could not transfer any “unique facility” to its Section 272 affiliate, unless it ensured that the transfer took place in an “open and nondiscriminatory” manner, so that “unaffiliated entities have an equal opportunity to obtain ownership of this facility.” *Id.* ¶ 218. Items such as DSLAMs and other equipment that are already installed in Applicants’ central offices or remote terminals plainly are “unique facilities” in that no competitive LEC can hope to replicate them without extraordinary expense and effort. There is simply no reasoned basis to exempt transfers to advanced services affiliates from this rule.

Condition VII provides (¶ 28) that transfers of equipment other than items deemed a network element by 47 C.F.R. § 51.319, as that rule was in effect on January 24, 1999, will not cause an advanced services affiliate to be deemed a “Bell Operating Company.” This provision also appears to be more limited than Section 272 in a crucial respect. The *Non-Accounting Safeguards Order* provided that the transfer of “any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)” would render a Section 272 affiliate a “Bell Operating Company” pursuant to Section 3(4). *Non-Accounting Safeguards Order* ¶ 309. The Condition’s requirement, by referring only to the Commission’s rules, fails to specify that any

⁹³ See AT&T 706 Comments at 71-91; AT&T 706 Reply Comments at 73-88.

transfer of equipment that has been deemed a network element by a *state commission* will also render an affiliate a BOC pursuant Section 3(4).

Sunset. Condition VII states (§ 39(a)) that the advanced services affiliate provisions will sunset three years after the Merger Closing Date. This provision is far weaker than its Section 272 counterpart, Section 272(f), which provides for *potential* sunset in each state three years *after* the date a BOC receives Section 271 authorization in that state, but permits the FCC to extend Section 272's requirements indefinitely. Further, Section 272(e)'s nondiscrimination provisions are not subject to sunset at *any* time.

Moreover Condition VII sunsets in the event a court "determines that, as a result of one or more of the permitted activities between the incumbent LEC and the separate Advanced Services affiliate described in sub-paragraphs 27(a)-(e), the separate Advanced Services affiliate must be deemed a successor or assign of the incumbent BOC for the purposes of applying 47 U.S.C. § 153(4)(A)." Proposed Conditions § 39(c). In the event of an adverse judicial ruling, this provision would permit Applicants to escape with essentially *no* advanced services conditions of any kind. There is no basis for this broad "escape clause."

C. Condition VII's "Transition Period" Measures Are Deeply Flawed

Condition VII would permit Applicants to provide advanced services without using an affiliate until the affiliate received the necessary state approvals. During this "transition period," Condition VII would establish requirements that seek to achieve the "functional equivalent" of an advanced services affiliate. These proposals, however, are deeply flawed.

The "limitations" imposed during the transition period are essentially meaningless. Condition VII provides (§ 31(f)(2)) that "Customer orders for Advanced Services obtained by

the incumbent LEC must be passed to the separate Advanced Services affiliate for processing,” but provides no indication of what it means for an order to be “passed to” the affiliate. It is thus unclear if Condition VII contemplate a “warm transfer” of a potential customer during a telephone contact, electronic transmission of orders to the advanced services affiliate, or some other form of interaction. The key term “processing” is also undefined.

This “obligation” is even less clear in light of Paragraph 31(f)(4) of the Proposed Conditions, which requires that any order an affiliate receives for advanced services “shall be passed to the incumbent LEC, which shall provide Advanced Services to the SBC/Ameritech customer.” Reading these provisions of Condition VII in concert appears to require that orders received by a SBC-Ameritech incumbent LEC must be “passed to” the affiliate; but orders received by the affiliate must be “passed to” the incumbent LEC. At bottom, the requirements of the transition period are so vague and unclear that they could not constrain Applicants’ conduct in any fashion.

D. The Conditions’ OSS Discount Provisions Are Inadequate

Condition VII would require Applicants to “provide a discount of 25 percent off of the recurring and nonrecurring charges (including of [sic] the Surrogate Line Sharing Charges, if applicable) that otherwise would be applicable for unbundled local loops used to provide Advanced Services in the same relevant geographic area” in the event Applicants failed to meet their commitments regarding pre-ordering and ordering OSS. Proposed Conditions ¶ 35. These penalties would apply,

Until SBC/Ameritech has developed and deployed OSS options for pre-ordering and ordering xDSL and other Advanced Services in satisfaction of Paragraph 16 of these Conditions and the EDI interface specified in that sub-paragraph is used by the separate Advanced Services affiliate for pre-ordering and ordering a substantial majority of its

Advanced Services in the relevant geographic area.

Id.

The above provision is of no real value, because it would not impose any *ongoing* requirement on Applicants. If Applicants attained the required thresholds⁹⁴ in a particular state at any point in time, they will arguably thereafter be excused from providing the required discounts if they later fail to meet them. For example, Applicants' advanced services affiliate might use the specified OSS for 85 percent of their orders in a given state for one month (or less), but then began to send only 10 percent of its orders over those systems. Condition VII would allow Applicants to briefly comply with the required thresholds, and then modify their OSS interfaces or make other changes to disadvantage competitive LECs and defeat Condition VII's intent.

E. Applicants' Advanced Services Affiliate Should Not Automatically Be Regarded As Nondominant

Condition VII provides (§ 36) that the "affiliate(s) required by this Section shall be regulated by the FCC as non-dominant carrier(s) with respect to the provision of Advanced Services." This provision is flawed in several respects.

Nondominant status is in no way conditioned on Applicants demonstrating compliance with – or even complying with – the requirements of Condition VII. As AT&T showed above, the separate affiliate provisions of Section 272, which are the basis for Condition VII, have to date been met with open defiance. It would be patently unreasonable simply to accept

⁹⁴ The thresholds required by this paragraph are simply an unspecified "substantial majority." Because Condition VII fails to provide any guidance, Applicants would presumably declare themselves fully compliant and cease providing OSS discounts as soon as their order volume reached 51 percent.

Applicants' paper promises that they will abide by Condition VII. Indeed, Condition VII also fails to provide that nondominant status may be revoked in the event Applicants are found to be noncompliant at some point in the future.

Although the Commission has found that Section 272 affiliates should be afforded nondominant status for in-region interLATA services, such affiliates will not be able to provide those services until *after* a BOC obtains Section 271 authority, and thus has proved that its local market is open to competition. There are simply no grounds to grant nondominant status to Applicants' advanced services affiliate operating within Applicants' own territory at a time when Applicants retain market power. As AT&T has shown, Section 272 is significantly more restrictive than Condition VII's advanced services affiliate requirements. In light of that fact, the Commission plainly may not grant nondominant status to an Applicant's advanced services affiliate prior to the time that it would accord that status to a Section 272 affiliate offering services originating in its BOC parent's territory.

Shared Transport (Condition VIII)

Condition VIII, which purports to require Applicants to offer shared transport in the Ameritech territories, also fails to create any pro-competitive benefit. Condition VIII is nothing more than a stop-gap that applies only until the Commission issues a decision in the *UNE Remand Proceeding*.⁹⁵ If the Commission re-affirms the need for local switching and transport as unbundled network elements, then Applicants will be bound to follow that determination, and

⁹⁵ Second Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, 1999 WL 221834 (1999) ("*UNE Remand Proceeding*").